



**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was injured on February 21, 1997, when he was hit on the head by a pulley while working for Salina Steel Supply, Inc. (Salina Steel). In that accident, he suffered a laceration that required stitches. After the accident, claimant began suffering daily headaches, some of which were severe. He also claimed a neck injury and said he was having personality changes. Claimant's workers compensation claim against Salina Steel went to an Award, and claimant was found to have a 5 percent impairment for neck strain, a 10 percent impairment for personality changes, and a 7.5 percent impairment for persistent headaches, for a combined permanent partial impairment to the whole body of 22.5 percent. He was able to continue working after this accident. However, he continued being treated for chronic headaches, seeing his personal physician, Dr. Kevin Norris, about twice a year for medication management.

Claimant began working for respondent as a truck driver in February 2002. On May 29, 2002, while at a job site, claimant's boss hit him on the head twice with a hard hat. Claimant felt immediate pain in his head, became dizzy, and had a lump on the left side of his head. He went to see Dr. Norris that day and was told to go home. Claimant saw respondent's doctor the next day, and he was off work for one week. He continued to work for respondent until July 2002, when he was terminated.

Shortly after his termination by respondent, claimant went to work for Russell Stover. He worked there for about a year, but he was terminated for missing too much time from work, which he attributed to his headaches, and for taking medication while at work. Claimant has not worked, nor has he looked for work, since August 2003, and he has been on Social Security disability since that time.

Claimant says his headaches now are probably twice as bad as they were before the May 2002 incident. The headaches come on suddenly and are "explosive."<sup>1</sup> He said these severe headaches are different than the ones he has on a daily basis and are worse than those he had before May 2002. Claimant testified he also has noticed a personality change since the 2002 accident. He is more irritable now when he is having a headache,

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<sup>1</sup> R.H. Trans. at 14.

and he described his anger now as “unreal.”<sup>2</sup> He also said his neck is stiffer and hurts more now than it did before the May 2002 incident.

Dr. Kevin Norris has been treating claimant for headaches since February 1997. Claimant was on Ultram and Flexeril for his headaches, and later was placed on Maxalt for migraines. Dr. Norris said that although claimant suffered from chronic headaches before the May 2002 incident, he had learned to live with his headaches and was able to continue to work as a driver. After the May 2002 incident, however, claimant’s headaches became more severe and he was not getting relief from his medication. Dr. Norris said that claimant also complained of memory problems and personality changes. Dr. Norris said that as well as Flexeril and Tramadol (a generic form of Ultram), claimant is now on Darvocet. He said that claimant’s headaches stem from the area where he had the contusion after being hit by the hard hat.

On July 7, 2006, Dr. Norris wrote a memo in which he opined:

The patient has been fairly well-controlled on his current medications which include Darvocet, Ultram and Flexeril and it is my opinion that the patient likely will have chronic problems with recurrent headaches for the rest of his life. The major reason that the patient has achieved fairly good control of his headaches it [sic] that he has been able to maintain a stress free lifestyle. When he has tried to gain employment he has had not only recurrence of his headaches, but has demonstrated that he has difficulty processing information and has demonstrated emotional lability in these situations. I do not think that this patient is employable at this time nor do I think he will be employable in the future related to his chronic conditions.<sup>3</sup>

Dr. Norris believes that claimant’s lack of employability is directly traceable to the May 2002 incident that aggravated or intensified his chronic headaches.

Dr. Michael Poppa is board certified in occupational and preventative medicine. At the request of claimant’s attorney, he examined claimant on October 26, 2006. Claimant told Dr. Poppa that after being hit on the head on May 29, 2002, he experienced immediate headaches and a sharp pain in his head and neck, as well as dizziness and blurred vision. Claimant also told the doctor that he had a large “goose egg” on his head after being hit by the hard hat. Claimant told Dr. Poppa about the previous injury to his head and neck in 1997.

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<sup>2</sup> *Id.* at 16.

<sup>3</sup> Norris Depo., Ex. 2 at 1.

Based on a review of claimant's medical records, the history given to him by claimant, and his physical examination, Dr. Poppa opined that claimant was at maximum medical improvement. It was Dr. Poppa's opinion that claimant sustained a work-related injury to his head that resulted in a contusion and an aggravation of his preexisting conditions of cephalgia, vertigo and chronic headaches. He said the headaches were possibly contributed to by the use of narcotic and non-narcotic medications. Dr. Poppa said that claimant's cervical spine condition was consistent with a chronic strain, spasm, chronic myofascitis, and intermittent radiculopathy. It was Dr. Poppa's opinion that claimant's employment at respondent was the direct and proximate cause of his resulting conditions involving his head, neck and upper extremities.

Based on the AMA *Guides*,<sup>4</sup> Dr. Poppa said claimant was now in diagnosis related estimate (DRE) cervicothoracic Category III with a 15 percent permanent partial impairment for his cervical spine, saying that in his physical examination he found claimant had decreased sensitivity in some of the fingers and the thumbs of his right and left hands. Dr. Poppa believes this decreased sensitivity is related to cervical radiculopathy. He also assigned claimant a 25 percent impairment for his head injury, using the AMA *Guides* chapter dealing with psychiatric impairments. These combined for a total impairment rating of 36 percent permanent partial impairment to the whole person. Dr. Poppa was aware that as a result of the 1997 injury, claimant had been found to have a 22.5 percent functional impairment. But he said that his 36 percent impairment rating did not include claimant's preexisting impairment and was solely the result of his most recent accident. In so saying, Dr. Poppa took into consideration the fact that before May 29, 2002, claimant said he occasionally missed one day of work per week but after the May 29, 2002 accident he missed two to three days per week, so his condition had been aggravated and materially changed. Also, he said that claimant had apparently been stable before the May 29, 2002 accident.

As it relates to claimant's employment, Dr. Poppa opined that claimant is severely limited in his functional capabilities and is unemployable due to the physical limitations placed upon him by Dr. Norris, which he agreed with. He said that claimant's unemployability is the result of his work injury of May 29, 2002, which resulted in his chronic conditions and chronic medication use.

Dr. Paul Stein, a board certified neurosurgeon, examined claimant on July 5, 2007, at the request of respondent. Claimant primarily complained of a head injury that occurred at work on May 29, 2002. Claimant reported to him that he had memory difficulties, personality change, neck pain, migraine headaches, and possibly a mild cervical strain.

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<sup>4</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

He had a prior injury at work in 1997 that resulted in his having headaches that never went away, as well as neck pain that radiated down his left arm and numbness and tingling in the left arm. However, claimant told Dr. Stein the numbness and tingling had resolved. Claimant told Dr. Stein he had returned to work after the 1997 injury, but was still taking medication for chronic headaches.

Claimant told Dr. Stein he was off work a few days after being hit in the head in May 2002. He returned to restricted work for a few weeks, then regular work for three weeks, and was then fired. He went to work at another job as a truck driver for a couple of weeks but quit because of his headaches and neck pain. He then went to work for Russell Stover, but was fired because he was taking pain medication.

Upon physical examination of claimant, Dr. Stein found some mild decrease in range of motion of his neck and mild tenderness to palpation. Otherwise, his neurological examination was intact. Dr. Stein opined that claimant had a mild closed-head injury in 1997 and 2002 and subsequently had multiple complaints not fully documented.

Dr. Stein opined that the incident of May 29, 2002, represented an aggravation of claimant's previous injury. He also believed that absent claimant's previous head injury, it was unlikely that the May 2002 injury would have resulted in the kind of symptomatology he is complaining of at this time.

Dr. Stein did not believe that claimant had any additional impairment for his cervical spine over his previous 5 percent rating from his 1997 injury. He said at the time he saw claimant, claimant was not in Category III and at most was in Category II.

In regard to claimant's complaints of headaches, Dr. Stein said that claimant had a previous impairment of 7.5 percent for chronic and severe headaches. It was Dr. Stein's opinion, based predominantly on claimant's complaints, that he would have between 0 and 2 percent additional impairment from the 2002 incident.

In regard to claimant's complaints of personality changes, Dr. Stein said he could not give a rating for that complaint because he was unable to document anything definitive since adequate testing had not been done. He said claimant had a lot of complaints, but complaints are not the same as objective deficit. From the information Dr. Stein had at the time of his examination, he did not think claimant would have any additional impairment more than 4 percent to the body as a whole. But he recommended additional testing by way of a neuropsychological evaluation to substantiate that possible 4 percent increase.

After Dr. Stein's report and before his deposition, claimant had a neuropsychological evaluation performed by Dr. Lyle Baade. Upon receiving the results of that evaluation, Dr. Stein opined that there was no objective documentation to state within a reasonable

degree of medical probability that claimant sustained any permanent impairment as a result of the work incident in May 2002. And since there was no additional impairment, there was no physical basis to require permanent work restrictions from that incident. However, based on a purely physical point of view, Dr. Stein recommended that claimant avoid lifting more than 50 pounds with any single lift up to twice a day, 30 pounds occasionally and 15 pounds frequently but not continuously, and that he avoid overhead activity or activity requiring his neck to be in strained positions. These restrictions were related to everything claimant was complaining about, including his first accident.

Lyle Baade, Ph.D, is a clinical neuropsychologist and has additional training on brain behavior relationships, particularly people who might have cognitive or personality changes secondary to head injury, stroke or other neurological event or disease. He is a professor and vice chairman in the Department of Psychiatry and Behavioral Sciences at the Kansas University Medical Center.

At the request of respondent, Dr. Baade conducted a neuropsychological examination of claimant. He met with claimant on November 9, 2007; January 4, 2008; and February 14, 2008. Dr. Baade said that in doing neuropsychological testing, there are always included some tests designed to detect whether the patient is putting forth adequate effort. In the event the patient is not putting forth adequate effort, other tests given on that occasion are not interpreted. In claimant's case, two such tests were given, and claimant failed one of those tests. On the other test, he passed the test, but there were some inconsistencies in the performance of the test. Dr. Baade determined he could not interpret the tests. Therefore, he was unable to form an opinion as to whether claimant sustained any brain dysfunction or cognitive deficit as a result of the injury of May 2002.

Dr. Baade said that claimant's description of his 1997 injury was such that it would be classified as a mild injury. During the next two years, when neurologically he would still be healing from that injury, claimant would have been subject to a more serious injury if he were to receive another blow to the head. However, with the distance in time of these two accidents, the term cumulative would be appropriate. Claimant already perhaps had some deficits, and what other deficits that came from the second injury would be added to those to form a greater deficit.

Dr. Baade noted in his report that during the testing, claimant consumed three Ultram and one Flexeril on January 4, 2008, and four Ultram on February 14, 2008. Claimant also told him he had taken Percocet the evening before. Dr. Baade said it would be unlikely that taking Ultram or Flexeril at normal doses would significantly affect test results. Dr. Baade said if an individual is on certain medications, he will test that person using the medications, otherwise the person might have some withdrawal symptoms that would interfere with the results or might have pain symptoms that would interfere with the testing. Dr. Baade said he takes into consideration that the medications might suppress

some scores. However, in claimant's case, he thought it was unlikely that the medications he was taking would have done so.

George Athey Jr., Ph.D., is a clinical psychologist and neuropsychologist. Dr. Athey's training in neuropsychology is not considered mainstream because it did not exist when he was in graduate school. But with his academics and experience, all he needed was a supervised series of cases to fulfill the training criteria. He has been doing neuropsychological evaluations since the mid to late 1970s.

Dr. Athey met with claimant at the request of claimant's attorney, who requested that he determine whether claimant had any cognitive symptoms consistent with a brain injury. Dr. Athey asked that claimant not take pain medication on the day of the testing and preferably not the evening before. Also, he had claimant take a break every hour and had claimant give him subjective ratings of his pain experiences. His intent was to minimize any effects of pain. He suspected that the reason he obtained different results from his testing than Dr. Baade was either because claimant was taking medication during Dr. Baade's testing or because claimant was experiencing more pain when taking the tests administered by Dr. Baade.

Dr. Athey believes he got a valid effort as claimant's best effort in the five separate validity tests as well as three embedded validity tests. He said that it was improbable that someone could pass all eight tests if they were trying to make up their symptoms or malingering.

Dr. Athey said that claimant's verbal intellect was low. His verbal conceptual index score, which is like an IQ score, was 68, which falls in a range that can be associated with retardation. He said that claimant had dyslexia, which was a preexisting learning disability. In testing oral fluency, claimant showed signs of distorted abnormal speech, which Dr. Athey said would be objective evidence of a brain injury. It is Dr. Athey's opinion that claimant has symptoms consistent with an acquired brain injury. Dr. Athey's report states that claimant's deficits were "partly created and partly aggravated by the client's injury of 5-29-2002."<sup>5</sup>

Dr. Athey believes that claimant has a cognitive disorder that was at least partly created or aggravated by his injury of May 29, 2002. He admitted that his testing does not tell him the onset of the cognitive disorder but only tells him it is there. The only basis he has for saying something was acquired that would impede his work was claimant's report of when it became difficult or impossible for him to work. Dr. Athey had no data from any prior evaluation of claimant from which he could make a determination of whether claimant

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<sup>5</sup> Athey Depo., Ex. 2 at 5.

had any cognitive difficulties before May 29, 2002. Dr. Athey also testified that the effects of trauma would be cumulative.

In reviewing the results of Dr. Athey's symptom validity testing of claimant, Dr. Baade said he would agree that the free-standing symptom validity tests showed appropriate effort by claimant but the embedded ones did not. Dr. Athey testified that he computed one of the embedded scores as questionable, but Dr. Baade would have said that particular one was a failure. Dr. Baade did not give claimant the Category Test but Dr. Athey did. Dr. Athey computed the Bolter Index items as being within normal limits. Dr. Baade, however, said that Dr. Athey did not compute any of the four or five King indices, all of which would have indicated that test was invalid.

Robert Barnett, Ph.D., is a clinical psychologist who is also certified in various workers compensation roles, such as counselor, evaluator and job placement specialist. At the request of claimant's attorney, he interviewed claimant by telephone on July 31, 2006, and again on August 28, 2006. Dr. Barnett could not remember if both his visits with claimant were by telephone or if he visited with him in person one of the times. He does not recall specifically meeting him or observing him.

Dr. Barnett is not board certified in neuropsychology but has been certified as an expert in neuropsychology in two courts. He was asked by claimant's attorney to review the raw data from the neuropsychological testing administered to claimant by Dr. Baade. He also reviewed Dr. Baade's formal report. Dr. Barnett opined that taking medication during neuropsychological testing would have an effect on the validity of the test. But Dr. Barnett further stated that he did not know whether Ultram or Flexeril were narcotic medications and because he was not a medical doctor he did not want to give a medical opinion. Dr. Barnett noted that claimant scored on the IQ test in the mildly retarded range, which was inconsistent with his observations of claimant during his evaluation. He also said that some of the test results were suggestive of florid psychosis, which he said claimant is not.

Dr. Barnett prepared a list of tasks claimant performed in the 15-year period before his May 29, 2002, accident. Claimant told Dr. Barnett that he had not obtained a GED. Claimant also told Dr. Barnett that he had not sought employment because of limitations placed on him. Dr. Barnett said he believes claimant is unemployable, and that opinion is based primarily on Dr. Norris' opinion as expressed in his letter of July 7, 2006. He agreed that other than the statement that claimant was unemployable, that letter did not set out any traditional restrictions or limitations.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that



right depends.<sup>6</sup> “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”<sup>7</sup>

The ALJ determined that claimant met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment on May 29, 2002. The Board agrees and affirms. The dispositive issue on this appeal is the nature and extent of claimant’s disability, if any.

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>8</sup>

Dr. Stein relied upon his physical examination of claimant as well as Dr. Baade’s neuropsychological report to conclude claimant did not suffer any permanent impairment nor did he require permanent work restrictions as a result of the May 29, 2002 incident. Conversely, Drs. Norris, Poppa and the vocational expert Barnett concluded claimant was realistically unemployable as a result of the incident.

As noted by the ALJ, both Drs. Poppa and Barnett based their opinions on the physical limitations Dr. Norris imposed on claimant. But Dr. Norris did not impose any physical limitations on claimant.

Claimant argues that Dr. Norris was in the best position to evaluate claimant as he had been claimant’s treating physician after the 1997 accident as well as the 2002 accident. A close examination of Dr. Norris’ medical records is revealing. Those medical records reflect that Dr. Norris treated claimant from 1997 for headaches with occasional more severe migraine headaches. The ALJ accurately analyzed Dr. Norris’ contemporaneous medical records and noted that before 2002 claimant was being seen a few times per year for management of his chronic headaches. After the 2002 injury that pattern continued. After the accident claimant saw Dr. Norris in May and then returned to the doctor on July 22, 2002, and September 16, 2002. Claimant did not return to Dr. Norris until March 17, 2003, where it was noted claimant continued to have chronic headaches but was working at Russell Stovers and seemed to be doing well. At this point it appears

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<sup>6</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>7</sup> K.S.A. 2008 Supp. 44-508(g).

<sup>8</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

that claimant had returned to his baseline with chronic headaches. And despite claimant's termination of his job with Russell Stovers the claimant continued to describe his condition as better. The ALJ analyzed the records in the following fashion:

By January 14, 2004, Claimant described himself to Dr. Norris as "much better," with his headaches "much easier to control." On March 17, 2004, Claimant's headaches were noted to be "well-controlled on Ultram, Darvocet and Zanaflex." On September 17, 2004, he is described in Dr. Norris' notes as "doing well. . . His headaches most of the time are manageable."

The continued medical records contrast with claimant's testimony of worsening and further conflicts with Dr. Norris' July 7, 2006 memo that claimant is realistically unemployable even though his headaches had been fairly well controlled.

Simply stated, as a result of his head injury in 1997 claimant had remained symptomatic with medication for daily headaches and occasional migraine headaches. After the 2002 accident claimant complained of worsened headaches and was again provided medication for his daily headaches with occasional migraine headaches. A review of Dr. Norris' medical records supports the conclusion that claimant's headaches returned to the baseline that existed from 1997 to 2002. This supports Dr. Stein's opinion that claimant suffered a temporary aggravation with no permanent impairment.

The ALJ reviewed the entire evidentiary record and noted the contemporaneous medical records indicate that claimant's headaches have improved and are now more controlled. The ALJ concluded:

In attempting to reconcile the various doctors' opinions on increased impairment, the court has examined the treatment records of Dr. Norris very closely. Those records do not support Dr. Norris' opinions of either permanent aggravation or permanent total disability, although they would support a finding of temporary exacerbation. Claimant has chronic headaches, as he did before May 29, 2002. Dr. Norris' contemporaneous treatment records do not support the conclusion that they are worse now than before May 29, 2002. If the headaches are no worse now than before May 29, 2002, when Claimant remained capable of working full time (as he did until August, 2003, more than a year after the May, 2002 incident), he was not rendered permanently and totally disabled by the May 29, 2002 event.

The Board agrees and affirms. But the Board notes that claimant would be entitled to past medical compensation for the temporary aggravation of his preexisting medical condition until his condition returned to its baseline by the March 17, 2003 office visit with Dr. Norris. Claimant is entitled to future medical upon application.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated June 16, 2009, is modified to reflect claimant is entitled to past medical compensation as noted with future medical upon application and affirmed in all other respects.

**IT IS SO ORDERED.**

Dated this 26th day of February 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeffery K. Cooper, Attorney for Claimant  
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge